



THE STATE BAR  
OF CALIFORNIA

INTER-OFFICE  
COMMUNICATION

**DATE:** March 2, 2006

**TO:** Members of the Board Committee on Regulation,  
Admissions and Discipline Oversight

**FROM:** Scott J. Drexel, Chief Trial Counsel

**SUBJECT:** Proposed Amendments to Rule 2201, Rules of Procedure  
Regarding the Appointment and Scope of Authority of  
Special Deputy Trial Counsel -- Request for Public Comment

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***ISSUE***

Rule 2201 of the Rules of Procedure sets forth the procedure that is followed when a disciplinary complaint is received against a State Bar employee, an attorney member of the Board of Governors or an attorney member of the governing board of any other State Bar entity.

The Office of the Chief Trial Counsel proposes to make minor amendments to rule 2201 to clarify the process, to expand the time within which to initially review the complaint and to more clearly permit the Chief Trial Counsel or his designee to make the initial determination of whether the appointment of a Special Deputy Trial Counsel is necessary or appropriate.

The purpose of this agenda item is to request the authorization of the Board Committee on Regulation, Admissions and Discipline Oversight to publish the proposed amendments to rule 2201 of the Rules of Procedure for a 90-day public comment period.

***RECOMMENDATION***

The Office of the Chief Trial Counsel recommends that you authorize the publication, for a 90-day public comment period, of the proposed amendments to rule 2201 of the Rules of Procedure in the form attached hereto as Appendix A.

***DISCUSSION***

The Office of the Chief Trial Counsel occasionally receives disciplinary complaints against State Bar employees, close relatives of State Bar employees, attorney members of the Board of Governors, attorney members of the boards of State Bar entities and others State Bar members who have close personal, family or financial connections with the State Bar. The most common disciplinary complaint against a member in one of these categories is a complaint made by a respondent attorney who alleges

that the assigned deputy trial counsel has engaged in misconduct in his or her prosecution of the proceeding against the respondent.

Rule 2201 of the Rules of Procedure sets forth the procedure to be followed when complaints are received against State Bar employees, members of the Board of Governors and the other categories of individuals referenced above. In essence, once it is determined that the complaint potentially has merit, a “Special Deputy Trial Counsel” is appointed to investigate and, as appropriate, prosecute the proceeding. Currently, rule 2201 requires this determination to be made within 15 days. The Special Deputy Trial Counsel may not be an employee of the State Bar, a member of the Board of Governors or a Judge Pro Tempore of the State Bar Court. (Rule 2201(c), Rules Proc. of State Bar.)

The appointment of a Special Deputy Trial Counsel has its difficulties. There are relatively few individuals who are either willing or have the knowledge and expertise to act in that capacity, especially since the Special Deputy Trial Counsel must, in most cases, serve without compensation. (Rule 2201(d), Rules Proc. of State Bar.) Additionally, in order to ensure the independence of the Special Deputy Trial Counsel, he or she has all of the powers and duties of the Chief Trial Counsel and acts entirely in the place and stead of the Chief Trial Counsel in connection with the particular matter to which he or she is assigned. This independence carries with it a significant lack of control over the timeliness of the Special Deputy Trial Counsel’s performance of his or her duties. Generally speaking, these cases move through investigation and the State Bar Court much more slowly than other matters.

The proposed amendments to rule 2201 have several purposes. First, the amendments are intended to clarify the applicable procedures and the scope and nature of the initial review of the inquiry. Second, the proposed amendments more clearly authorize the Chief Trial Counsel or his designee to make the initial determination of (a) whether the factual allegations of the inquiry are sufficiently specific; (b) whether the inquiry is from a credible source; and (c) whether the factual allegations of the inquiry, if proven, could result in discipline of the member. Third, the proposed amendments would increase the time for the initial review of the inquiry and for determination of whether the inquiry should be closed or whether a Special Deputy Trial Counsel should be appointed from the current 15 days to 60 days.

As previously indicated, a significant number of the inquiries or complaints covered by rule 2201 are made by attorneys with pending disciplinary proceedings against them who complain that the deputy trial counsel assigned to their cases has engaged in misconduct. In addition, a large number of inquiries or complaints covered by rule 2201 are submitted by complaining witnesses whose complaints against State Bar members have been closed. These individuals frequently submit disciplinary complaints against the State Bar attorneys who closed their cases, accusing them of misconduct in their processing of the complaint or of being involved in a conspiracy with the State Bar member against whom the original complaint was submitted. Because of the significant shortage of individuals who are willing and able to serve as Special Deputy Trial Counsel, the initial review of the inquiries should be performed by the Chief Trial Counsel or his designee (such as the Special Assistant to the Chief Trial Counsel) and only those matters that have potential merit should be assigned to Special Deputy Trial Counsel.

Finally, the current 15-day period for making the initial determination of whether the matter should be closed or assigned to a Special Deputy Trial Counsel is insufficient. The determination of whether to forward all other complaints received by the Office of the Chief Trial Counsel from the Intake Unit to Investigation must be made within approximately 60 days. This 60-day time period is more realistic because, among other things, it is often necessary to have multiple contacts with the

complaining witness, the respondent attorney or others to obtain additional information to assist in the evaluation and assessment of the potential merits of the complaint.

***PROPOSED RESOLUTION***

If you agree that the proposed amendments to rule 2201 of the Rules of Procedure should be released for a 90-day public comment period, your adoption of the following proposed resolutions would be appropriate:

**“RESOLVED**, that the Board Committee on Regulation, Admissions and Discipline Oversight hereby authorizes the release of the proposed amendments to rule 2201 of the Rules of Procedure of the State Bar of California, in the form attached hereto as Appendix A, for a 90-day public comment period;

**FURTHER RESOLVED**, that authorization by the Board Committee on Regulation, Admissions and Discipline Oversight for publication for public comment is not, and Shall not be construed as, a recommendation or approval by the Board of Governors of the materials published.”

SJD:dim  
Attachment

## APPENDIX A

*[Addition Language in **Bold**; Deleted Language in ~~Strikeout~~]*

### CHAPTER 2. SPECIAL DEPUTY TRIAL COUNSEL

#### RULE 2201. APPOINTMENT AND AUTHORITY

- (a) The Chief Trial Counsel or designee may appoint one or more Special Deputy Trial Counsel when **the Office of the Chief Trial Counsel receives an inquiry or complaint regarding an** ~~inquiry, complaint or investigation is received against~~ the following:
  - (1) A member employed by the State Bar of California;
  - (2) An attorney member of the Board of Governors;
  - (3) An attorney member of the governing board of any other entity of the State Bar; **or**
  - (4) A member who has a current or recent personal, financial, or professional relationship to the State Bar, its employees, **or** a member of the Board of Governors, or in other appropriate circumstances to avoid the appearance of any impropriety.
- (b) A Special Deputy Trial Counsel shall have all of the powers and duties of the Chief Trial Counsel and shall act entirely in his or her place or stead with regard to such an inquiry **or** complaint ~~or~~ **and any resulting** investigation. A Special Deputy Trial Counsel may be removed by the Chief Trial Counsel only for good cause or any other condition that substantially impairs the performance of such Special Deputy Trial Counsel's duties.
- (c) A Special Deputy Trial Counsel must be an active member of the State Bar, but may not be an employee of the State Bar, a member of the Board of Governors, or a Judge Pro Tempore of the State Bar Court.
- (d) A Special Deputy Trial Counsel shall not receive compensation for services unless the Chief Trial Counsel has contracted in advance with that Special Deputy ~~Chief~~ Trial Counsel to receive compensation.
- (e) A Special Deputy Trial Counsel shall comply with the written or other established policies of the State Bar of California and the Office of the Chief Trial Counsel, except to the extent that compliance would be inconsistent with the purposes of this rule.
- (f) A Special Deputy Trial Counsel may request that the Chief Trial Counsel or designee authorize the payment of reasonable expenses and for investigative, administrative and legal support. The Chief Trial Counsel or designee shall have discretion to determine the amount of financial, investigative, administrative and legal assistance to be provided.
- ~~(g) The Chief Trial Counsel or designee, shall conduct a preliminary review to determine if the member described in paragraph (a) may have committed a criminal act(s), professional misconduct, or a violation of the State Bar Act or California Rules of Professional Conduct. In~~

~~determining whether grounds exist to conduct an inquiry or investigation, the Chief Trial Counsel or designee shall consider:~~

~~(1) — The specificity of the information received; and~~

~~(2) — The credibility of the source of the information.~~

~~(h) — The Chief Trial Counsel shall determine whether grounds to conduct an inquiry or investigation exist, not later than fifteen (15) days after the information is first received.~~

~~(1) — If within that fifteen (15) day period, the Chief Trial Counsel or designee determines that the information is not specific or is not from a credible source, then the Chief Trial Counsel or designee shall close the matter;~~

~~(2) — If within that fifteen (15) day period, the Chief Trial Counsel or designee determines that the information is specific and from a credible source, the Chief Trial Counsel or designee shall, upon making that determination, appoint a Special Deputy Trial Counsel to conduct an inquiry, investigation or other proceeding as necessary with respect to that information.~~

~~(3) — If the Chief Trial Counsel or designee is unable to determine if the information is specific and from a credible source, the Chief Trial Counsel or designee shall, at the end of the fifteen (15) day period, appoint a Special Deputy Trial Counsel to conduct an inquiry, investigation or other proceeding as necessary with respect to that information.~~

**(g) The Chief Trial Counsel or designee shall conduct a preliminary review of an inquiry regarding a member described in paragraph (a) to determine whether to appoint a Special Deputy Trial Counsel to investigate the matter.**

**(1) If the Chief Trial Counsel or designee determines that the factual allegations of the inquiry are not sufficiently specific, that the inquiry is not from a credible source or that the factual allegations contained therein, if proven, would not result in discipline of the member, the Chief Trial Counsel or designee shall close the matter.**

**(2) If the Chief Trial Counsel or designee determines that the factual allegations of the inquiry are sufficiently specific, that the inquiry is from a credible source and that the factual allegations contained therein, if proven, may result in discipline of the member, the Chief Trial Counsel or designee shall appoint a Special Deputy Trial Counsel to conduct an investigation and such other proceedings as necessary or appropriate with respect to the inquiry.**

**(3) If the Chief Trial Counsel or designee is unable to determine whether the factual allegations of the inquiry are sufficiently specific and from a credible source, or that the factual allegations of the inquiry, if proven, may result in discipline of the member, the Chief Trial Counsel or designee shall appoint a Special Deputy Trial Counsel to make those determinations and, as warranted, to conduct an investigation and such other proceedings as necessary or appropriate.**

- (h) The preliminary review required by paragraph (g) shall be completed within sixty (60) days after the written inquiry is first received; provided, however, that such time limit is not jurisdictional.
- (i) The Chief Trial Counsel shall recuse himself or herself with respect to an inquiry received by the Office of the Chief Trial Counsel if:

  - (1) The inquiry involves the Chief Trial Counsel;
  - (2) The Chief Trial Counsel believes, for any reason, that his or her recusal would further the interests of justice;
  - (3) The Chief Trial Counsel believes there is a substantial doubt as to his or her capacity to be impartial; or
  - (4) A person aware of the facts might reasonably entertain a doubt that the Chief Trial Counsel would be able to be impartial.

In the event of the Chief Trial Counsel's recusal, the inquiry shall be referred to the Chair of the Board's Committee on Regulation, Admissions and Discipline Oversight, who shall appoint a Special Deputy Trial Counsel to determine whether the factual allegations of the inquiry are sufficiently specific, from a credible source and whether, if the factual allegations contained therein, if proven, may result in discipline of the member. If the Special Deputy Trial Counsel determines that the factual allegations of the inquiry are sufficiently specific and from a credible source and that the allegations, if proven, may result in discipline of the member, the Special Deputy Trial Counsel shall conduct an investigation and such other proceedings as necessary or appropriate. ~~If the information received under this rule involves the Chief Trial Counsel or a person with whom the Chief Trial Counsel has a current or recent personal, financial or professional relationship, the Chief Trial Counsel shall recuse himself or herself. The matter shall be referred to the Chair of the Board Committee on Discipline, who shall appoint a subcommittee to conduct a preliminary review, pursuant to paragraphs (g) and (h) of this rule. Following its review, the subcommittee may appoint a Special Deputy Trial Counsel to conduct an inquiry, investigation or prosecution of the Chief Trial Counsel.~~

- (j) Upon the request of the Board Committee on Regulation, Admissions and Discipline Oversight, the Chief Trial Counsel shall submit a report to the Committee in closed session regarding the number, nature and disposition of inquiries, complaints or investigations involving the members described in paragraph (a), other than the Chief Trial Counsel. ~~In matters involving members employed by the Office of the Chief Trial Counsel, the Chief Trial Counsel or the Special Deputy Trial Counsel shall submit reports to a sub-committee appointed by the Chairperson of the Board Committee on Discipline, as requested, covering the number, nature and disposition of such complaints.~~